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GONZALES V. CARHART: BRINGING ABORTION LAW BACK INTO THE FAMILY LAW FOLD

Helen M. Alvaré*

I. INTRODUCTION

Among the first aspects of the Supreme Court's most recent abortion case to attract commentary¹ was the majority opinion's assertion of a "bond" between a woman and her unborn "child."² The affirmation of this bond by the majority in *Gonzales v. Carhart*³ was a precursor to the Court's decision to uphold a federal statute banning the performance of an abortion procedure in which "the doctor extracts the fetus in a way conducive to pulling out its entire body,"⁴ save the head, before "collapsing" or "crushing" its skull⁵ to "kill" the fetus.⁶ The statute at issue called the banned procedure "partial-birth abortion"⁷ because the fetus is mostly delivered from the woman at the time its existence is ended. However, throughout the opinion the Court used the term "intact dilation and extraction," or "intact D & E," one of several terms employed by the medical community to identify what the statute bans.⁸ The *Gonzales* opinion was further noted for its meticulous descriptions of intact D & E and other abortion procedures and language emphasizing the humanity and vulnerability of fetal life.

Gonzales's concepts and language merit the attention they received. Their like have not been seen in previous Supreme Court abortion opinions. In fact, the Court's pre-*Gonzales* abortion opinions were distinctly uncomfortable with language explicitly in-

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1. See e.g. Linda Greenhouse, *In Reversal of Course, Justices, 5-4, Back Ban on Abortion Method*, N.Y. Times A1 (Apr. 19, 2007); Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle; Court's 5-4 Decisions Underscore His Power*, Wash. Post A1 (May 13, 2007).

2. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) ("Respect for life finds an ultimate expression in the bond of love a mother has for her child.").

3. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

4. *Id.* at 1622 (internal citations omitted).

5. *Id.* at 1623 (internal citations omitted).

6. *Id.* (internal citations omitted).

7. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. 2004).

8. *Gonzales*, 127 S. Ct. at 1621 (internal citations omitted).

cluding fetal life within the category of human life. The opinions lack both internal consistency and consistency with each other in their use of language about fetuses.⁹ Furthermore, rather than seeing a bond between the woman and her fetus, prior opinions see confrontation, with the state taking the fetus's side by restricting or even regulating abortion.¹⁰ Even in its two abortion opinions most explicitly asserting the importance of gestating human life—*Webster v. Reproductive Health Services*¹¹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹²—the Supreme Court did not perform the full bow toward fetal humanity that it did in *Gonzales*. In *Webster*, for example, the Court spoke merely about the state's interest in "protecting . . . the potentiality of human life"¹³ and allowed states to decline to fund or provide abortion services,¹⁴ and to mandate viability testing for fetuses at twenty weeks or later in the gestation period.¹⁵ In *Casey*, the Court referred to the "potential life" within the woman¹⁶ before upholding provisions requiring informed consent,¹⁷ a twenty-four-hour waiting period,¹⁸ parental consent for minors requesting abortions,¹⁹ and reporting requirements.²⁰ The *Gonzales* Court, on the other hand, not only spoke of the fetus in terms usually reserved for born life,²¹ but also allowed the state to entirely ban a particular abortion procedure in the name of assisting women, the medical profession, and "respect for life"²² in general.

The *Gonzales* decision also differs from prior abortion cases because it appeared to adopt presumptions about parents and *unborn* children that family law typically applies to relationships between parents and their *born* children. These include, first, the presumption of a strong bond between a parent and his or her biological offspring, a bond that should be preserved whenever possi-

9. See *infra* pt. III.A (discussing language used in previous case law concerning abortion).

10. *Id.*

11. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

12. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality).

13. *Webster*, 492 U.S. at 516.

14. *Id.* at 511.

15. *Id.* at 519–20.

16. *Casey*, 505 U.S. at 871 (plurality).

17. *Id.* at 885.

18. *Id.* at 887.

19. *Id.* at 899.

20. *Id.* at 900.

21. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (using terms such as "infant life").

22. *Id.*

ble.²³ Second, family law presumes that children are naturally vulnerable; parents have the primary right (and responsibility) to protect them, but the state will intervene to either review or supplant parental decisions whenever a child's welfare is seriously endangered.²⁴ *Gonzales*, like many family law cases, apparently relied on these presumptions in deference to their claimed self-evident nature and in response to the assertions of the involved adults. *Gonzales*, in other words, created abortion law that looks and feels like family law, a distinct break from the Supreme Court's prior abortion jurisprudence.

The Court's behavior raises the question of the wisdom of creating greater conformity between abortion law and extant family law. A preliminary objection to this course of action is obvious: on its face, the parent-child relationship between a mother and her born child is likely different than the relationship a woman has with a still-gestating fetus. There is a reason, in other words, why many states allow women to surrender their children for adoption only after their birth, and not before:²⁵ after birth, the tie has a somewhat different quality. There is a reason why there often appears to be a more profound sense of loss when a young child dies than when a miscarriage occurs.²⁶ Yet this objection alone is insufficient. It is possible that these are differences in degree, not in kind, between parental relationships with unborn and born children, and between the vulnerability of born and unborn human life. *Gonzales*'s eyewitness description of intact D & E abortions,²⁷ for example, portrays the relative vulnerability of the fetal life involved. *Gonzales* also suggests that severing the woman-offspring relationship through abortion can cause a kind of maternal suffering,²⁸ basing its conclusion upon several sources—the *Casey* plurality opinion, an *amicus* brief submitted by 180 post-abortion patients, and the statements of abortion doctors.²⁹ A body of scientific literature confirms this possibility, indicating that some

23. *Infra* pt. II.A.

24. *Id.*

25. See e.g. Uniform Adoption Act § 2-404(a) (1994).

26. See generally Nancy Kohner & Alix Henley, *When a Baby Dies: The Experience of Late Miscarriage, Stillbirth and Neonatal Death* (Pandora Press 1991).

27. *Gonzales*, 127 S. Ct. at 1622–23.

28. *Id.* at 1634.

29. *Id.* at 1632–34 (citing *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852–53 (1992) (plurality); Br. for Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as *Amici Curiae* in Support of Petr. 22–24, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) [hereinafter Br. for Sandra Cano and 180 Women]).

women's abortions affect their later parenting and family-life decisions.³⁰

Another possible reason for harmonizing abortion law with the rest of family law merits recognition: the federal constitutional law on abortion explicitly traces its origins to earlier constitutional family law decisions on parent-child relations (discussed further in part IV). From this perspective alone, perhaps abortion law should be more consistent with the family law of parent-child relations.

Sufficient reasons thus exist for pursuing greater harmony between abortion law and the following family law inclinations regarding parent-child relations: first, taking as self-evident the existence of a bond between biological parents and their children; and second, acknowledging children's vulnerability as self-evident. The consequences of this harmonizing require close consideration. What are the likely consequences, not only for abortion laws, but also for the well-being of women, children, other family members, and society? It is an explicit fear of pro-choice advocates that when lawmakers focus upon fetal vulnerability and maternal-child bonding, women lose, because society will come to see women as it did in the past—fit only for maternal roles and tasks.³¹ Are there ways to acknowledge bonds between parents and their children and children's dependence upon adult care without "setting women back?"

Part II of this article explores family law's reliance on two presumptions regarding parent-child relationships: the existence of a natural bond between parents and their offspring and the vulnerability of children. Part III shows how these presumptions did not figure into pre-*Gonzales* abortion jurisprudence. In fact, directly contrary presumptions often arose. Part IV discusses those portions of the *Gonzales* majority opinion addressing the relationship between a woman and her "unborn child,"³² and the vulnerability of the latter. This part highlights the change *Gonzales* represents for abortion jurisprudence, particularly by contrasting the Court's majority opinion with the dissenting opinion of Justice Ruth Bader Ginsburg, who relied heavily upon language and themes stressed in prior abortion cases. Part V discusses the wisdom of extending typical family law presumptions about the par-

30. See *infra* nn. 194–205 and accompanying text.

31. See e.g. Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. Ill. L. Rev. 991–92 (2007).

32. *Gonzales*, 127 S. Ct. at 1634.

ent-child relationship to abortion law. This section also weighs relevant empirical data and medical research on the relationship between abortion and family well-being to demonstrate the wisdom of bringing abortion jurisprudence back into the family law fold from which it sprang. The conclusion suggests possible consequences of this course of action.

II. TWO FAMILY LAW PRESUMPTIONS REGARDING THE PARENT-CHILD RELATIONSHIP

A. *Parents and Children Have a Relationship the Law Should Protect*

Many of the most familiar areas of family law operate upon the assumption that it is self-evident that biological parents³³ have a strong natural bond with their children. Particular laws, therefore, act to protect and preserve those bonds. In the area of adoption, for example, the law regularly allows time for natural parents to change their minds after the initial surrender of their biological child to a would-be adoptive parent or parents.³⁴ Even in states that do not provide a set time period within which a natural parent may revoke consent, consent may ordinarily be revoked upon evidence of fraud, undue influence, or duress.³⁵ States must also provide opportunities for an unmarried biological father to receive notice and be heard regarding proceedings that may terminate his parental rights in order to transfer them to an adoptive parent or parents.³⁶

Statutes determining legal parentage, including the rights and obligations incident to parentage, are another obvious place to look for legal acceptance of the presumption that biological parents are attached to their children. Such statutes usually rely upon genetic and gestational connections to determine parentage. The statute of Rhode Island is typical: “[b]irth parent” means

33. This article focuses on biological parents because of the biological relationship between women seeking abortions and the fetuses they carry.

34. See e.g. Ark. Code Ann. § 9-9-220(b)(1)(A) (West 2003) (allowing revocation within 10 days if in best interest of child); 23 Pa. Consol. Stat. Ann. § 2711 (West 2004); Uniform Adoption Act § 2-404(a) (1994) (permitting revocation within 192 hours of child’s birth).

35. See e.g. Mass. Gen. Laws ch. 210 § 2 (West 1998); Colo. Rev. Stat. § 19-5-104(7) (West 2005).

36. *Lehr v. Robertson*, 463 U.S. 248, 263–64 (1983).

"[t]he person who is legally presumed under the laws of this state to be the father or mother of genetic origin of a child."³⁷

Another area of family law demonstrating the law's preference for preserving the relationships between parents and their children concerns child abuse or neglect. When the state seeks to terminate parental rights on either ground, the law sets the hurdles high. The state must provide "clear and convincing evidence" of the existence of parental misconduct or failure, often in addition to evidence that terminating the biological parent's rights would be in the child's best interests.³⁸ Additionally, even after a child is removed from his or her biological parent's home, the State must make a reasonable effort to reunify the child with his or her parents.³⁹ Even the federal Adoption and Safe Families Act of 1997,⁴⁰ which emphasizes permanency planning for children over family reunification to a much greater degree than earlier law, continues to require reasonable reunification efforts, except in dire circumstances such as very lengthy foster care periods, murder, or felony assault.⁴¹

In the area of custody law, the Supreme Court has held that a parent has a federal constitutional right to the primary custody and care of his or her children.⁴² Additionally, in custody contests between two parents, a significant number of U.S. jurisdictions look favorably upon joint custody awards in the name of preserving the child's relationship with *both* biological parents.⁴³ Several jurisdictions have moved to joint custody presumptions out of deference to the importance of maintaining all parent-child bonds.⁴⁴

37. R.I. Gen. Laws § 15-7.2-1(6) (2007); *see also* Cal. Fam. Code § 8512 (2004) (defining "[b]irth parent" as "the biological parent, or, in the case of a person previously adopted, the adoptive parent").

38. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); *see e.g.* Mo. Rev. Stat. § 211.447.4 (Supp. 1997); *In re A.M.C.*, 32 S.W.3d 155, 158 (Mo. App. W.D. 2000); Ga. Code Ann. § 15-11-94(a) (2007); Neb. Rev. Stat. § 43-292 (2004); *In re Int. of Shelby L.*, 699 N.W.2d 392, 397 (2005).

39. *See e.g.* Ga. Code Ann. § 15-11-94(b)(4)(C)(iii) (2007).

40. 42 U.S.C. § 671(a)(15)(A) (2000).

41. *Id.* at § 671(a)(15)(D).

42. *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (explaining "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents").

43. *See* Linda D. Elrod, *Child Custody Practice and Procedure* ch. 5 (rev. ed., West 2004 & Supp. 2006).

44. David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 Hofstra L. Rev. 1461, 1471–72 (2006) (citing Andrew I. Schepard, *Children, Courts and Custody: Interdisciplinary Models for Divorcing Families*, 57 British J. of Sociology 730 (2006); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: "Same-Sex" Marriage Issue Dominates Headlines*, 38 Fam. L.Q. 777, 789–95 (2005)).

Even considering that joint custody has come under additional scrutiny recently,⁴⁵ it remains legally and personally ideal for parents to cooperate in serving the best interests of the child.⁴⁶

Even when a biological parent loses a custody or visitation dispute to a person who is not a biological parent, it may be on the ground that the latter person has formed a parent-like relationship—as a “psychological” or “de facto” parent—with the child, a relationship that the biological parent has allowed or even encouraged to form.⁴⁷ In other words, the grant of custody or visitation rights to one who is not a child’s biological parent is a variation on the general theme or presumption of deference to the parent-child bond, not a rejection of it.

This brief overview of some of the most frequently litigated areas of family law indicates that lawmakers regularly act on the presumption that the bonds between parents and their biological children are self-evident and ought to be preserved. Another presumption that permeates family law concerns the vulnerability of the child.

B. Children Are Self-Evidently Vulnerable and Require the Protection of Their Parents or, Failing This, of the State

A second presumption underlies a significant number of family laws: children are self-evidently vulnerable, particularly relative to adults, and require special solicitude and protection. Parents have the first duty and first right to shield their vulnerable children; if they fail, the state may intervene on the children’s behalf.

Federal constitutional law regarding parent-child relationships highlights children’s relative vulnerability by insisting that the primary trait of the legal relationship between parents and

45. Meyer, *supra* n. 44, at 1472–73. “Initially, joint custody was eagerly embraced by legislators and judges as a way of validating and encouraging the involvement of both parents. Over time, its reception has become more mixed. Some have criticized joint custody on the ground that it awards fathers rights without corresponding duties, and that it has induced some mothers to cede property or support rights in exchange for sole custody. And some scholars have recently detected a general retreat from joint custody, with more judges limiting it to cases where both parents consent to the idea.”

46. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody after Divorce*, 64 Tex. L. Rev. 687, 705 (1985) (suggesting that empirical evidence demonstrates “regular contact with both parents” after divorce provides a child improved parenting).

47. See e.g. *V.C. v. M.J.B.*, 748 A.2d 539, 541–42 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959, 962 (R.I. 2000); Carolyn Wilkes Kaas, *Breaking up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 Wm. & Mary L. Rev. 1045 (1996).

children is “duty.” John Locke’s *Second Treatise on Government* summarizes well the position articulated over time in U.S. family law: “[t]he Power that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Offspring.”⁴⁸

Beginning in early constitutional cases addressing the relationship between parents and the State relative to children, the Supreme Court explicitly articulated versions of this Lockean principle.⁴⁹ In a case affirming parents’ rights to direct their children’s education, for example, the Court said: “those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁵⁰ In a later case concerning the right of an unwed father to notice and a hearing regarding the adoption of his biological child, the Court stated explicitly that the “rights of the parents are a counterpart of the responsibilities they have assumed.”⁵¹ After finding that the father had not stepped forward to assume responsibility for the child, the Court held that the “Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.”⁵² The State, rather, could move forward without the father to consider the child’s best interests.

Child protection laws also illustrate family law’s concern for children’s vulnerability as well as the State’s willingness to intervene when parents are unwilling or unable to protect their own children. Increased sensitivity to children’s physical and mental vulnerability relative to adults has led to increasingly widespread and effective lawmaking in recent decades.

Many other areas of family law involve the shielding of children. For example, bans on incestuous marriages are based, in part, upon the belief that such marriages are most likely to disadvantage young children at risk of being exploited by older relatives.⁵³ Limits upon the age at which children may marry without parental or judicial consent are also based upon children’s imma-

48. John Locke, *Second Treatise on Government* § 58 (Thomas P. Peardon ed., Liberal Arts Lib. 1952).

49. *Meyer v. Neb.*, 262 U.S. 390, 400 (1923); *Pierce v. Socy. of Sisters*, 268 U.S. 510, 535 (1925).

50. *Pierce*, 268 U.S. at 535.

51. *Lehr v. Robertson*, 463 U.S. 248, 249–50, 257 (1983).

52. *Id.* at 262.

53. Student Author, *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family”*, 119 Harv. L. Rev. 2464, 2464 (2006).

turity and consequent vulnerability.⁵⁴ Adoption—the extinguishing of a parent’s rights over a particular child and the establishment of new parental rights in another—is not effective by mere private agreement, but requires a state inquiry into the fitness of the adoptive parents.⁵⁵ States also will not automatically agree to custody and child support terms privately agreed upon by divorcing parents in a separation agreement.⁵⁶ Finally, prior to granting a divorce, an increasing number of jurisdictions require parents to complete “parent education” courses to learn how to effectively parent children in a post-divorce context.⁵⁷

C. A Caveat

Two particular areas of family law have not adopted the presumptions about parent-child bonds and children’s vulnerability described above. These include the areas of assisted reproductive technologies (ARTs) and same-sex marriage. It appears, rather, they have been more strongly influenced by pre-*Gonzales* abortion precedents stressing adult needs and interests, while exhibiting indifference toward the separation of children from their biological parents. For example, it is generally agreed that the dearth of regulation regarding ARTs—consequently permitting the separation of children from their biological parents and the triumph of adult interests—is traceable, in part, to abortion law. The 2004 report from the President’s Council on Bioethics, *Reproduction and Responsibility*, listed as a probable reason for the lack of regulation regarding ARTs that

[p]roposed efforts to regulate or monitor assisted reproduction are viewed by many people through the prism of *Roe v. Wade*. . . . Defenders of reproductive freedom want no infringement of the right to make personal reproductive decisions This situation creates a powerful disincentive for any regulation of the uses of reproductive technologies.⁵⁸

54. Lynn Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Fam. L.Q. 497, 501 (1995).

55. See e.g. 1 Ohio Fam. Law § 3.20 (Bender & Co., 2006); 1-16 N.J. Fam. Law § 16-15 (Bender & Co., 2004).

56. See e.g. Uniform Marriage and Divorce Act § 306(b), 9A U.L.A. 249 (1998).

57. Margie J. Geasler & Karen R. Blaisure, 1998 *Nationwide Survey of Court-Connected Divorce Education Programs*, 37 Fam. & Conciliation Cts. Rev. 36 (1999); Jeffrey T. Cookston et al., *Prospects for Expanded Parent Education Services for Divorcing Families with Children*, 40 Fam. Ct. Rev. 190 (2002).

58. The President’s Council on Bioethics, *Reproduction & Responsibility: The Regulation of New Biotechnologies* 8 (Mar. 2004) (available at <http://www.bioethics.gov/reports/>)

In the only federal court of appeals decision to affirm a constitutional right to procreate using ARTs, *Lifchez v. Hartigan*,⁵⁹ the Court affirmed a lower court's holding that the right of "privacy and reproductive freedom as established in *Roe v. Wade*"⁶⁰ was broad enough to encompass a right to access in-vitro fertilization.

Consequently, today neither state nor federal laws ban transactions of sperm, eggs, or embryos, with the result that children are regularly separated from their biological parents. State parentage laws simply confirm adult choices in this regard by cutting off any parental rights of gamete or embryo "donors" and vesting such rights in the person or persons intending to rear the child.⁶¹ Nor are there laws protecting children from risks posed to their health by ART procedures or outcomes, including but not limited to multiple births, genetic abnormalities, pre-implantation genetic diagnosis, selective reduction (the aborting of one or more fetuses in multiple pregnancies), and egg or embryo freezing and thawing.⁶²

The development of the law concerning same-sex unions has also sometimes relied upon pre-*Gonzales* abortion law and reflected the latter's stance toward parent-child relations and children's vulnerability. *Roe* and *Casey* were relied upon explicitly by the plaintiffs in *Goodridge v. Massachusetts Department of Public Health*⁶³ to argue that the Constitution protects adult individuals' "personal decisions" about the family, including the decision to marry a person of the same sex.⁶⁴ These same cases were referenced by the Massachusetts Supreme Court in concluding that decisions about "whether and how to establish a family" are matters of "individual" liberty.⁶⁵ In the end, the *Goodridge* court affirmed unions that, by definition, result in the separation of every child of every such union from at least one of his or her biological par-

reproductionandresponsibility/_pcbe_final_reproduction_and_responsibility.pdf) [hereinafter *President's Bioethics Report*].

59. *Lifchez v. Hartigan*, 735 F. Supp 1361 (N.D. Ill. 1990), *aff'd without opinion*, 914 F.2d 260 (7th Cir. 1990), *cert. denied sub nom. Scholberg v. Lifchez*, 498 U.S. 1069 (1991).

60. *Id.* at 1363 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

61. *President's Bioethics Report*, *supra* n. 58, at 51 n. 95; Harry D. Krause et al., *Family Law: Cases, Comments and Questions* 399-401 (6th ed., Thomson West 2007); Helen Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 Harv. J. on Legis. 1, 26-27 (2003).

62. *Id.* at 26-30.

63. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

64. See Pl.'s Mot. S.J., *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

65. See *Goodridge*, 798 N.E.2d at 959.

ents.⁶⁶ The court also performed a noticeably cursory and biased review of the literature on children's well-being in same-sex households before concluding that granting "marriage" status to such unions would not harm children's interests.⁶⁷

The contents of these two areas of family law do not alter the conclusion that family law generally has accepted as self-evident a bond between parents and their children, and children's vulnerability and need for protection. Rather, these areas simply confirm the influence of abortion law. The treatment of parent-child relationships in both of these areas also suggests that, unless *Gonzales* marks the beginning of a change, abortion law is already influencing family law's treatment of born children and their relationship with their parents.

It is axiomatic in family law that children are relatively vulnerable, and that the law should willingly intervene when children are at risk. It is also assumed that parents feel bonded to their children and that family law should take care to preserve these bonds when possible. This article now turns to abortion law to consider how the U.S. Supreme Court's pre-*Gonzales* abortion cases declined to incorporate either of these presumptions. Instead, the Court has generally ignored both, and in some cases, supplanted them with contrary presumptions.

III. HOW THE SUPREME COURT'S ABORTION CASES HAVE IGNORED OR CONTRADICTED FAMILY LAW'S PRESUMPTIONS REGARDING PARENTAL ATTACHMENT AND CHILD VULNERABILITY

Numerous Supreme Court decisions address the constitutionality of state or federal abortion regulations or restrictions. Generally, while some of the Court's decisions make passing reference to the painful or difficult⁶⁸ nature of the abortion decision—presumably an oblique reference to a relationship between the woman and her developing fetus—most portray an unplanned preg-

66. *Id.* at 968.

67. *Id.* at 961–64; see also Helen M. Alvaré, *The Turn toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 *Stan. L. & Policy Rev.* 135, 171–82 (2005) (addressing in detail the treatment of children's interests in each of the leading state cases affirming same-sex unions and in the Massachusetts Constitutional Convention considering same-sex marriage).

68. See e.g. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality) (explaining that "[abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; . . . for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life").

nancy as a confrontation between the respective rights of the woman and the fetus, in which the State sides with the fetus, against the woman.⁶⁹ Supreme Court abortion jurisprudence also commonly demonstrates a preference for terminating relationships rather than preserving them, in the face of claims that a born child burdens a woman's ability to realize her interests.⁷⁰ Rather than stressing the vulnerability of the fetus, abortion cases devote considerable attention to the vulnerability of the woman seeking an abortion.⁷¹ The Court's inability to decide, during three decades of decisions, precisely what to call the woman and the fetus in an abortion procedure is symbolic of the Court's reluctance to employ family relationship concepts in abortion cases. Terminology is important because without a "child" and a "mother," by definition there can be no parent-child relationship at issue in the abortion context.

The leading abortion cases—*Roe v. Wade*,⁷² *Thornburgh v. American College of Obstetricians and Gynecologists*,⁷³ *Webster v. Reproductive Health Services*,⁷⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁵ and *Stenberg v. Carhart*⁷⁶—accurately capture the most crucial themes and language concerning parent-child relations present in the Court's pre-*Gonzales* abortion jurisprudence.

A. *Strength of Biological Parent-Child Relationship*

In *Roe v. Wade*, the Supreme Court began the practice of using several terms per case to refer to the entity being aborted and the woman seeking the abortion. Sometimes the Court called the former a "fetus,"⁷⁷ sometimes "prenatal life,"⁷⁸ sometimes "potential life"⁷⁹ or the "potentiality of human life,"⁸⁰ sometimes an "unborn,"⁸¹ and sometimes an "unborn child."⁸² At other times, the

69. *Infra* pt. III.A.

70. *Id.*

71. *Id.*

72. *Roe v. Wade*, 410 U.S. 113 (1973).

73. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

74. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

75. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality).

76. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

77. *Roe*, 410 U.S. at 162.

78. *Id.* at 156.

79. *Id.* at 163.

80. *Id.* at 162.

81. *Id.*

82. *Id.*

Court avoided a label completely, calling abortion only a woman's right to "terminate her pregnancy."⁸³ As for the woman, she was called, alternately, the "pregnant woman,"⁸⁴ the "patient,"⁸⁵ the "woman,"⁸⁶ and the "mother" whose "maternal health"⁸⁷ was at stake. The *Roe* Court also pioneered another theme that would figure prominently in later abortion cases: what lay between the mother and the fetus in her womb was a contest, not a relationship.⁸⁸ On the child's side, the contest was waged by the State, whose interest begins in earnest at viability because the fetus presumably "has the capability of meaningful life outside the mother's womb."⁸⁹

The *Thornburgh v. American College of Obstetricians and Gynecologists* case, seven years post-*Roe*, involved a statute as likely as any to invite the Court to consider the topic of a parent-child relationship in the abortion context. Pennsylvania had passed an "informed consent" law requiring abortion doctors to inform their patients about the availability of certain information regarding fetal development, possible medical risks of abortion, risks of childbirth, and various types of financial and medical assistance that might be available to her.⁹⁰ The *Thornburgh* Court, rather than taking the opportunity to note any possible maternal-fetal relationship, spoke as if there existed a contest between the mother and the fetus. It did so by characterizing Pennsylvania's informed consent provisions as means to "confuse," "punish,"⁹¹ and "intimidate" women into continuing their pregnancies.⁹²

Nine years later, *Webster v. Reproductive Health Services*⁹³ offered the Court another opportunity to discuss the possibility of a mother-child relationship in the abortion context. The Missouri legislature had passed a law with a preamble stating that the "natural parents of an unborn child had protectable interests in the life, health and well-being of their unborn child."⁹⁴ Like *Roe*,

83. *Roe*, 410 U.S. at 153.

84. *Id.* at 162.

85. *Id.* at 163.

86. *Id.* at 162.

87. *Id.* at 163-64.

88. *Id.*

89. *Roe*, 410 U.S. at 163.

90. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 760-61 (1986).

91. *Id.* at 762.

92. *Id.* at 759.

93. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

94. Mo. Rev. Stat. § 1.205.1(3) (1986).

however, the *Webster* Court exhibited uncertainty as to the nature of the parties of interest in an abortion context. It referred to the fetus as both “potential human life”⁹⁵ and “a form of human life.”⁹⁶ The woman seeking the abortion was most often referred to simply as “the woman”⁹⁷ or the “pregnant woman,”⁹⁸ yet her status as mother was also indirectly confirmed by reference to her “maternal health.”⁹⁹ *Webster* also very explicitly envisioned the mother and child in a contest versus a relationship, stating the balance the Court struck in abortion cases was between the “claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort.”¹⁰⁰

Even the 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰¹ decision—regarded as a substantial setback by pro-choice activists due to its holding that abortion is a constitutional “liberty” interest as opposed to a “fundamental” right—did not move abortion law in the direction of family law on parent-child relations. The *Casey* Court, rather, continued the theme of confrontation. The Court portrayed the abortion right as protecting the liberty of the “individual” woman¹⁰² against the state’s interest in what the Court now called “the life of the fetus that may become a child.”¹⁰³ The *Casey* plurality observed, but did not further develop, that abortion was “an act fraught with consequences for others,” including the spouse, the family, society, doctors, the woman, and, “depending on one’s beliefs, for the life or potential life that is aborted.”¹⁰⁴ In the end, though, despite acknowledging obliquely the possibility that some family members might feel themselves in some sort of relationship with the fetus, the *Casey* Court struck down Pennsylvania’s law requiring a woman to notify her spouse about her abortion plans.¹⁰⁵

Finally, in *Stenberg v. Carhart*,¹⁰⁶ the Supreme Court’s first “partial-birth abortion” decision, the Court stressed that the paramount interest in abortion jurisprudence is the woman’s interest

95. *Webster*, 429 U.S. at 515.

96. *Id.* at 520.

97. *See e.g. id.* at 508.

98. *Id.* at 509.

99. *Id.* at 515.

100. *Id.* at 520.

101. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality).

102. *Id.* at 853.

103. *Id.* at 846.

104. *Id.* at 852.

105. *Id.* at 901.

106. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

in “choos[ing] whether to have an . . . abortion.”¹⁰⁷ There was no suggestion of any relationship between the woman, or anybody else, and the fetus. The Court referred to the fetus as a “pregnancy,” “potential human life,” and “the contents [of the uterus]”—language far removed from the idea of a parent-child relationship.¹⁰⁸ For the most part, the Court referred to women seeking abortions simply as “women,”¹⁰⁹ although there were some references to a woman’s “maternal” situation¹¹⁰ and to the woman as a “mother” (through citations to an earlier case).¹¹¹

The family law theme of a self-evident relationship between parent and biological child is noticeably absent in the Supreme Court’s leading abortion decisions. Rather, the Court’s abortion cases refrain from casting the fetus in the role of a child and the woman in the role of a mother, instead envisioning the woman and the State locked in a contest over the fate of the fetus, a contest in which the woman’s freedom is very much at stake.

B. Vulnerability of the Child

Supreme Court abortion cases lack a second theme common to discussions of parent-child relations within family law: the vulnerability of the child and the corresponding duties of the parents and the State to shield the child. Instead, these cases stress the vulnerabilities of the woman seeking an abortion and of women in society generally, on account of their status as child-bearers. To the extent children’s relative weakness is acknowledged at all, the Court suggests that children born following unwanted pregnancies will likely suffer unhappiness.

Looking first at *Roe*, its most substantial discussion of the fetus concerns whether there is anything in the history of the Constitution or U.S. law to indicate that lawmakers understood the fetus to be a legal “person” entitled to the 14th Amendment’s protection of “life.”¹¹² The Court concluded that there was not: “[i]n short, the unborn have never been recognized in the law as persons in the whole sense.”¹¹³ It was the pregnant woman’s vulnerability, instead, that took center stage in *Roe*. Immediately follow-

107. *Id.* at 930 (citing *Casey*, 505 U.S. at 875 (plurality)).

108. *Id.* at 923.

109. *Id.* at 929.

110. *Id.* at 928.

111. *Id.* at 930 (quoting *Casey*, 530 U.S. at 879 (plurality)).

112. *Roe v. Wade*, 410 U.S. 113, 156–62 (1973).

113. *Id.* at 162.

ing its announcement that the Constitution contains a privacy right that includes abortion, the Court expounded in emotional terms the harms women might suffer without access to legal abortion:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹¹⁴

In *Thornburgh*, Pennsylvania seemed to invite consideration of the theme of child vulnerability with its statute requiring that near-viability abortions be performed using the method most likely to deliver the child alive.¹¹⁵ But again, the Court's opinion spoke only about the woman's vulnerability. In fact, the *Thornburgh* opinion is noteworthy among all abortion opinions for its near-complete focus upon the woman's situation, establishing that a woman should bear no increased medical risk at all to preserve the life of her viable fetus,¹¹⁶ a theme that would appear in later abortion cases. It was only in Justice White's dissent in *Thornburgh* that the family law theme of the child's vulnerability appeared. He stated that, although the Court had located the abortion right in constitutional family law stressing parental duties to children, abortion involves parents "assault[ing]" versus protecting their children.¹¹⁷

The *Webster* Court upheld the nonbinding preamble of a Missouri law, reciting the "protectable interests in life, health, and well-being" of the unborn child, who possesses "all the rights, privileges, and immunities available to other persons."¹¹⁸ However, it did not address the theme of the vulnerability of children.

Casey returned to and expanded the theme of the woman's vulnerability. The *Casey* plurality emphasized that women are

114. *Id.* at 153.

115. *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986).

116. *Id.*

117. *Id.* at 792 n. 2.

118. *Webster v. Reprod. Health Servs.*, 429 U.S. 490, 504-07 (1989) (quoting Mo. Rev. Stat. §§ 1.205.1(1), (2), 1.205.2 (1986)).

not only vulnerable when they have unwanted pregnancies, but are generally socially vulnerable due to their ability to bear children. On the first theme, the Court opined that a woman requires a right to abortion to avoid the “anxieties” and “physical constraints” that “only she must bear” in a pregnancy.¹¹⁹ On the second theme, the plurality claimed that the abortion right is an essential part of the foundation of modern social freedoms for women. Women have long relied “on the availability of abortion in the event that contraception should fail.”¹²⁰ In other words, abortion provides women definitive “control [over] their reproductive lives.”¹²¹ Without abortion, said the Court, a woman’s right to “participate equally in the economic and social life of the Nation” would be compromised.¹²²

The *Casey* Court considered the possible vulnerability of the fetus only once, and only post-birth. Seemingly presuming that an unwanted pregnancy would always result in an unwanted child or a child without proper assistance, the Court opined that “[a parent’s] inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.”¹²³

Stenberg, relying heavily on *Casey*, also stressed the woman’s vulnerability as opposed to that of the fetus.¹²⁴ The Court focused on the woman’s vulnerability despite the nature of the abortion procedure at issue in that case, which the Court acknowledged to be “gruesome” and “distressing”¹²⁵ as it involves “skull penetration” and “vacuuming out the . . . brain” of a nearly fully delivered fetal body.¹²⁶ Rather, the *Stenberg* Court discussed at significant length the mother’s health interests in maintaining access to every abortion method believed by some groups of doctors to provide a marginal safety benefit for the mother in a particular instance.¹²⁷ Only when referring to the opinion of some Americans that abortion is the “death of an innocent child”¹²⁸ did the majority opinion use language ascribing any vulnerability to the fetus.

119. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality).

120. *Id.* at 856.

121. *Id.*

122. *Id.*

123. *Id.* at 853.

124. See *Stenberg v. Carhart*, 530 U.S. 914, 937–38 (2000).

125. *Id.* at 946 (Stevens, J., concurring); *Casey*, 505 U.S. at 951 (Ginsburg, J., concurring).

126. *Stenberg*, 530 U.S. at 959–60 (Scalia, J., dissenting).

127. *Id.* at 931–38.

128. *Id.* at 920.

In sum, not only do abortion opinions fail to acknowledge the two family law themes described above, but they actually propose distinctly contrary themes. The next part describes how the *Gonzales* Court reversed the course of abortion jurisprudence by affirming an attachment between biological parents and their offspring and emphasizing the vulnerability of fetal life.

IV. *GONZALES*: ABORTION LAW THAT LOOKS LIKE FAMILY LAW

The majority opinion in *Gonzales v. Carhart* brings abortion jurisprudence into greater conformity with family law's presumptions about parent-child relations. This part will analyze this shift in the order of the two family law themes identified above, then highlight the significance of the majority's opinion by contrasting its language and themes with those found in the dissenting opinion of Justice Ginsburg.

A. *Biological Parents' Attachment to Their Own Children*

The majority opinion in *Gonzales* states outright that a bond exists between a woman and her biological offspring and that the severance of this bond via abortion—particularly via the intact D & E procedure—may cause significant and lasting pain for the woman. Regarding the bond itself, the majority wrote: “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”¹²⁹ The Court's use of language like “mother” and “child” places the analysis immediately into a family law context. So does the majority's choice of labels for the fetus like “a living organism while within the womb,” “unborn child[],” “infant life,” and “child assuming the human form.”¹³⁰

Continuing its discussion of the relationship between a woman and her offspring, the Court further observed that as a consequence of this bond abortion can be a “difficult and painful moral decision.”¹³¹ It stated that “some women come to regret their choice to abort the infant life they once created and sustained. Se-

129. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

130. *See id.* at 1615–16, 1620, 1634.

131. *Id.* at 1617 (citing *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852–53 (1992) (plurality)). It is unusual, maybe unique, to see this phrase used in the introduction of an argument to allow any aspect of the right of abortion to be restricted by the state. Usually one sees this observation at the beginning of an argument in favor of retaining the abortion right as the private choice of a particular woman to make such difficult and moral decisions without interference by the state. *See e.g. id.*

vere depression and loss of esteem can follow.”¹³² For these points, the majority opinion cited an *amicus* brief filed by 180 women who experienced abortion, led by the woman who was the plaintiff in *Doe v. Bolton*¹³³ (*Roe*’s companion case). The Court observed that women, as a consequence of the mother-child bond, would likely suffer more anguish if doctors were allowed to perform intact D & E abortions. The Court based this conclusion on two sources. First, it looked to the testimony of doctors in a New York case challenging a partial-birth abortion ban, stating that “they do not describe to their patients what [the D & E and intact D & E] procedures entail in clear and precise terms.”¹³⁴ Second, it considered the claimed self-evident fact that a woman, post-abortion, would likely suffer greater anguish after learning that an intact D & E was performed, because she “allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”¹³⁵

A final noteworthy aspect of the Court’s treatment of the mother-child bond is how prominently it figures in the legal outcome of *Gonzales*. The Court upheld the constitutionality of the Partial Birth Abortion Ban Act, in part based on evidence of the possible harm to women, society, the medical profession, and “respect for life”¹³⁶ stemming from the performance of intact D & E abortions. As a result, the Court could not conclude that the “congressional purpose” of the act was to “place a substantial obstacle in the path of a woman seeking an abortion.”¹³⁷

B. Children’s Vulnerability

The *Gonzales* majority opinion also spoke specifically of the self-evident vulnerability of children and the corresponding duties arising from such vulnerability. The most significant means by which the *Gonzales* majority highlighted this theme was its relatively lengthy and detailed descriptions of abortion methods, including but not limited to intact D & E.

132. *Id.* at 1634 (internal quotations omitted).

133. *Doe v. Bolton*, 410 U.S. 179 (1973).

134. *Gonzales*, 127 S. Ct. at 1634 (quoting *Natl. Abortion Fedn. v. Ashcroft*, 330 F. Supp. 2d 436, 466 n. 22 (S.D.N.Y. 2004)) (brackets in original).

135. *Id.*

136. *Id.*

137. *Id.* at 1635 (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality)).

The first relevant aspect of the Court's descriptions is its regular use of hard-hitting words to describe what abortion methods do to fetal bodies: "killing," "decapitating," "crushing," "piercing," "ripping," "dismemberment," and "caus[ing] the fetus to tear apart."¹³⁸ It notes that the doctor might have to make ten to fifteen "passes" in order to pull out all of the pieces of the fetal body.¹³⁹ Yet, even this language highlighting fetal vulnerability pales in comparison to the Court's incorporation into its opinion of the entire eyewitness account of a partial-birth abortion provided by a nurse at a hearing before Congress:

Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus

The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp

He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.¹⁴⁰

Finally, the *Gonzales* Court emphasized the child's vulnerability with its statements regarding how others witnessing, performing, or even thinking of the procedure (including the woman herself) may be affected. They experience the child as helpless and dependent. Regarding the doctors who perform abortions, for example, the Court referred to the statement of a doctor at the trial level that it is a "difficult situation"¹⁴¹ for medical staff who find themselves dealing with a fetus that has still "some viability to it, some movement of limbs."¹⁴² The Court held that the government can legitimately conclude that a procedure such as intact D & E—which is more "shocking"¹⁴³ than other abortion procedures—might cause a coarsening of the profession trained to care for human lives, and of the public's view of the profession, espe-

138. *Id.* at 1614–17, 1621–24, 1628–29.

139. *Id.* at 1621.

140. *Gonzales*, 127 S. Ct. at 1622–23 (citing H.R. Rpt. No. 108–58, at 3 (Apr. 3, 2003)) (ellipses in original).

141. *Id.* at 1623.

142. *Id.*

143. *Id.* at 1634.

cially due to how the procedure “perverts a process during which life is brought into the world.”¹⁴⁴

C. Justice Ginsburg’s Dissent

The changes made by *Gonzales* to federal constitutional abortion law can be understood more clearly by contrasting the majority’s opinion in that case with Justice Ginsburg’s dissenting opinion. Emphatically restating themes found in earlier abortion cases, most particularly *Casey*, Justice Ginsburg stated that the centerpiece of abortion jurisprudence is “woman’s autonomy to determine her life’s course and thus to enjoy equal citizenship stature.”¹⁴⁵ No matter which dictionary one consults, “autonomy” appears as a concept opposite to the notion of “relationship.” It describes behavior that is “self-governing,” “self-directing,”¹⁴⁶ and “independent.”¹⁴⁷ It is derived from the Greek *autonomia*, meaning “having its own laws.”¹⁴⁸ Justice Ginsburg would have held in *Gonzales* that if some doctors claim that a banned abortion procedure is marginally safer for a woman in any particular circumstances, the ban must fall, with no need to consider how the procedure treats the fetus.¹⁴⁹

Concerning the particular question of the existence of a mother-child bond—and whether abortion might therefore cause pain to women—Justice Ginsburg was emphatic that women do not suffer significantly harmful effects from their abortions.¹⁵⁰ In an extraordinarily long footnote, Justice Ginsburg cited studies and articles disclaiming the existence of anything like “post-abortion syndrome.”¹⁵¹ For now, it suffices to say that Justice Ginsburg seemed more eager to disclaim the possibility of abortion-related suffering than the evidence might support, or even than her prior statements have suggested. Further discussion of the weight and content of these articles is contained in part V below.

144. *Id.* at 1635 (citing 18 U.S.C. § 1531 Cong. Findings at (14)(K) (2000 ed., Supp. IV)).

145. *Id.* at 1641 (Ginsburg, J., dissenting).

146. Merriam-Webster Online Dictionary, www.m-w.com/dictionary/autonomy (accessed May 30, 2008).

147. The American Heritage Dictionary of the English Language (4th ed., Houghton Mifflin 2000).

148. AskOxford.com, http://www.askoxford.com/concise_oed/autonomy?view=uk (accessed May 30, 2008).

149. *See Gonzales*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting).

150. *See id.* at 1648.

151. *Id.* at 1648 n. 7.

Finally, Justice Ginsburg restated the theme found so often in pre-*Gonzales* abortion cases about the vulnerability of women. Using language and terms more insistent than any found in earlier abortion opinions, Justice Ginsburg opined that without legal abortion, women would be returned to the sort of pre-feminist existence of “ancient” times, vulnerable to all earlier preconceptions and oppressions that had beset women.¹⁵² She presented abortion, in other words, as a linchpin of female liberation, central to women’s lives.¹⁵³ No portion of her opinion considered fetal vulnerability.

There is no guarantee in the volatile world of Supreme Court abortion opinions (a sort of judicial soap opera for academics and even the public) that the new majority perspective on abortion at the Supreme Court will “hold” for one more opinion, for none, or for many. In fact, toward the end of her stinging dissent, Justice Ginsburg finally declared that “[a] decision so at odds with our jurisprudence should not have staying power.”¹⁵⁴ There is no doubt, however, that if it holds, abortion law will come to look more like the rest of family law. The following part suggests that there is wisdom in better harmonizing abortion law with the rest of family law.

V. THE RATIONALE FOR ADOPTING FAMILY LAW PRESUMPTIONS IN ABORTION CASES

Some assume that abortion law inherently must remain distinct from the remainder of family law given that the former concerns *preventing* the coming to fruition of a developed family relationship, a parent-child relationship. Yet there are several reasons why this might be too simplistic a conclusion, both at the practical, experiential level and at the level of the law.

A. Abortion Law Derived from Family Law

In *Roe v. Wade*, women’s constitutional right to choose abortion was grounded in large part upon earlier Supreme Court decisions about parents’ fundamental rights respecting the custody and care of their children. In the course of seeking constitutional support for the existence of a privacy right sufficiently broad to encompass abortion, *Roe* specifically cited and relied upon previ-

152. *Id.* at 1649.

153. *Id.* at 1649–50, 1653.

154. *Id.* at 1653.

ously identified substantive due process rights concerning “family relationships” and parents’ rights to make decisions about “child rearing and education.”¹⁵⁵ Here, the Court cited its prior decisions in *Prince v. Massachusetts*,¹⁵⁶ *Meyer v. Nebraska*,¹⁵⁷ and *Pierce v. Society of Sisters*.¹⁵⁸

Yet in each of these cases, the two family law presumptions discussed above are fully apparent. The *Prince* Court, for example, spoke famously of the rights and duties of biological parents with respect to their dependent children: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁵⁹ *Prince* also spoke clearly about the child’s relative vulnerability and need for protection, citing society’s “interests . . . to protect the welfare of children, and the state’s assertion of authority to that end.”¹⁶⁰ “The last is no mere corporate concern of official authority,” continued the Court, but “the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”¹⁶¹

In his dissent in the *Thornburgh* case, Justice Byron White acknowledged the *Roe* Court’s explicit reliance on family law precedents. He wrote,

[t]he Court has justified the recognitions of a woman’s fundamental right to terminate her pregnancy by invoking decisions upholding claims of personal autonomy in connection with the conduct of family life, the rearing of children, marital privacy, the use of contraceptives and the preservation of the individual’s capacity to procreate.¹⁶²

Thus, *Roe* saw the relationship between a woman and her fetal offspring in the context of parent-child relationships, relationships which had heretofore been understood to be dominated by notions of parental attachment and duty toward children.¹⁶³ But is this a sufficient reason to insist that abortion law operate according to

155. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

156. *Prince v. Mass.*, 321 U.S. 158, 166 (1914).

157. *Meyer v. Neb.*, 262 U.S. 390 (1923).

158. *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925).

159. *Prince*, 321 U.S. at 166 (citing *Pierce*, 268 U.S. 510).

160. *Id.* at 165.

161. *Id.*

162. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 791 (1986) (White, J., dissenting).

163. *See supra* pt. II.

the same presumptions employed generally in family law dealing with the parent-child relationship? Is consistency the highest value in this situation? Or is it better to say that since the vast body of family law involves *born* children, it is nonsensical to care whether abortion law is out of step with the rest of family law? The next section suggests that this latter conclusion is wrong, because, insofar as family well-being is concerned, there is not a clean break between the way in which adults and society experience and perceive decisions about unborn and born children.

*B. The Abortion Decision May Be Experienced
as a "Family Decision"*

There is evidence that abortion is experienced by some women and men as a decision about parenting, before, during, and after the abortion decision itself. The abortion may, for example, cause grief similar to the grief experienced at the loss of a born child. The child's innocence and vulnerability may play a role in both situations. Abortion may also affect decisions about whether or not to have children in the future. Or it may affect the quality of adults' relationships with future children, or with one another.

Pro-choice advocates, including Justice Ginsburg and others, speak in two conflicting ways about the evidence regarding any link between abortion and parenting decisions. On the one hand, they regularly acknowledge that abortion is "painfully difficult,"¹⁶⁴ presumably because the woman has feelings for her offspring or feelings about what the abortion procedure does to him or her. It is common, for example, for pro-choice politicians to affirm the emotional difficulties of having an abortion to the point of advocating a national campaign to reduce abortion. Senator Hillary Clinton, a 2008 Democratic presidential primary candidate, regularly affirmed that abortion should be "safe, legal and rare," and recently supported a "zero" abortions goal for the nation.¹⁶⁵ She has referred to abortion as "sad," "tragic," and "the most difficult [decision] that a woman will ever make."¹⁶⁶ Senator Barack Obama, the 2008 Democratic presidential nominee, has referred to women "anguish[ing] over [abortion] decisions" and promised to

164. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1648 n. 7 (2007) (Ginsburg, J., dissenting).

165. Christina Bellantoni, *Hillary's 'Zero' Abortions Goal Hit; Both Sides See Little Consensus*, Wash. Times A8 (June 8, 2007).

166. Hillary Rodham Clinton, *Remarks by Senator Hillary Rodham Clinton to the NYS Family Planning Providers* (Jan. 24, 2005) (available at <http://clinton.senate.gov/~clinton/speeches/2005125A05.html>).

work to prevent unwanted pregnancies.¹⁶⁷ Former U.S. presidential candidate and Mayor of New York City Rudolph Giuliani has spoken quite similarly.¹⁶⁸ All are implicitly observing that abortion involves the choice to deliberately prevent or terminate a parent-child relationship.

On the other hand, those supporting legal abortion insist that claims of post-abortion maternal suffering influencing future behavior are scientifically wrong and even socially disastrous for women. Justice Ginsburg's *Gonzales* dissent is an excellent example of this argument.¹⁶⁹ A leading abortion scholar, Reva Siegel (on whom Justice Ginsburg firmly relies in *Gonzales*¹⁷⁰) agrees, opining that abortion restrictions grounded upon protecting women from abortion's claimed harmful consequences are unconstitutional and paternalistic attempts to enforce "sex stereotypes."¹⁷¹

This article is interested in this debate only insofar as it concerns the possible relationship between abortion and the well-being of the family. It does not take the position that legislators should enact abortion restrictions in order to protect women from themselves or to ensure that women's social role is limited to maternity. Women have the power to avoid that role entirely or to combine it with additional roles in most cases; to suggest otherwise is to propose a drastically limited belief about the scope of women's freedom. Rather, this article pursues the possibility that, if abortion is a decision about family and has the power to affect family relationships, then abortion law should employ the same insights and presumptions about the family employed in many other areas of family law. These have been understood over time and across many areas of family law to reflect family life as it is actually lived and to help strengthen this most critical of institutions for the good of the whole society. As described in part I, above, the pre-*Gonzales* family paradigm in the areas of ARTs and same-sex marriage allows parents and children to be more easily

167. Bellantoni, *supra* n. 163, at A8.

168. *CNN Newsroom*, "Obama's Big Money; Giuliani Speaks Out; Iran; Captives Free; A Growing Demand for Ethanol; Eddie Robinson Dies" (CNN Apr. 4, 2007) (TV broad.) (available at <http://www.cnn.com/TRANSCRIPTS/0704/04/sitroom.03.html>) (former Mayor of New York City Rudy Giuliani stating in an interview with Wolf Blitzer, "[a]bortion is wrong, abortion shouldn't happen, personally you should counsel people to that extent").

169. See *Gonzales*, 127 S. Ct. at 1640–53 (Ginsburg, J., dissenting).

170. See *id.* at 1641 (citing Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1002–28 (1984)).

171. Siegel, *supra* n. 170, at 991–92.

separated and adults' interests to easily trump those of children. However, sufficient evidence exists regarding how abortion may affect a family's well-being to support the conclusions of the *Gonzales* majority that abortion law should no longer reject traditional family law assumptions about parent-child bonding and about children's vulnerability.

Full examination of the literature—really, the heated controversy—on the question of abortion's impact upon women, including upon their future family relations, would require a very lengthy article indeed. And it should be noted preliminarily that shockingly little comprehensive research has been performed in the U.S. about the effects of abortion, considering the fact that there is no other surgery so frequently experienced by American women.¹⁷² This lack of empirical data is part of the reason why the conflicting sides of the abortion debate can still “talk past” one another on the particular subject of abortion's effects. However, the nuanced statements of the *Gonzales* majority—that “some”¹⁷³ women experience suffering of a specifically maternal nature after abortion, concerning the fate of a vulnerable child—have sufficient bases in fact to warrant some action in response to them.

The first evidence to consult about abortion's aftermath is that employed by the *Gonzales* Court's majority opinion. The Court first cited Justice Sandra Day O'Connor's plurality opinion in *Casey*, which stated as self-evident the conclusion that abortion is a “difficult and painful moral decision” with implications for the entire family and for society.¹⁷⁴

Next, the majority cited the post-abortion experiences of 180 women, set forth in plain, raw language in affidavits appended to an *amicus* brief.¹⁷⁵ A review of the affidavits in this brief reveals anecdotal, but consistent, evidence of the link that these pregnant women felt with their developing fetuses, the pain they experienced when the link was terminated, and its effects upon their future family lives. “I had a natural desire to have my baby and to raise her,” began one woman.¹⁷⁶ Many affidavits reported a rela-

172. See Alan Guttmacher Institute, *Facts on Induced Abortion in the United States*, http://www.guttmacher.org/pubs/fb_induced_abortion.html (updated Jan. 2008) (estimating there are nearly 3300 abortions each day in the U.S.).

173. *Gonzales*, 127 S. Ct. at 1634.

174. *Id.* at 1634 (citing *Casey*, 505 U.S. 833, 852–53 (1992) (plurality)).

175. Br. for Sandra Cano and 180 Women 22–24, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

176. Aff. of Sandra Cano, Br. for Sandra Cano and 180 Women app. B. at 4, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

tionship between an abortion and later marital difficulties: “The deep emotional scars were a large contributing factor in my divorce.”¹⁷⁷ Another tied her abortion to her “emotionally abusive relationship for 11 years until my divorce.”¹⁷⁸

A high percentage of the affidavits reported effects upon later child-rearing: “Now with a 6 year old son, I am overly protective to a fault. His relationship with his father is damaged because of my own fears of losing my son.”¹⁷⁹ Some expressed the inability to be with children or even the need to “punish myself” by sterilization so no more children could be conceived.¹⁸⁰ Some spoke of their horror in contemplating what abortion did to the body of their unborn child.¹⁸¹ Some expressed trouble bonding with later born children.¹⁸² Again and again, the affidavits related that the women suffered depression, many to the point of substance abuse or contemplation of suicide.¹⁸³

177. Aff. of Donna M. Razin, Br. for Sandra Cano and 180 Women app. B at 12, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

178. Aff. of Elizabeth Campbell, Br. for Sandra Cano and 180 Women app. B at 32, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

179. Aff. of J.L.M., Br. for Sandra Cano and 180 Women app. B at 14, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007); Aff. of Becky Abell, Br. for Sandra Cano and 180 Women app. B at 23, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (“I was an overprotective mother. I ‘overdid’ everything—to compensate for what I had done.”); Aff. of Elizabeth Campbell, Br. for Sandra Cano and 180 Women app. B at 32, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant describing herself as an “overprotective parent to the point of smothering my children”); Aff. of Hemda Ben-Judah, Br. for Sandra Cano and 180 Women app. B at 22, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant explaining “I am overly protective of my own children”).

180. Aff. of Deborah R. Paine, Br. for Sandra Cano and 180 Women app. B at 19, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (“In my need to punish myself, I had a tubal ligation (sterilization). So now I am childless. After killing my children, I did not deserve to be a mother.”).

181. Aff. of Dana N. Landers, Br. for Sandra Cano and 180 Women app. B. at 17, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant explaining she was unable to heal until she “admitted that the abortion was murder” and “society had convinced me that he/she was just a piece of tissue”); Aff. of N.A.M., Br. for Sandra Cano and 180 Women app. B. at 54, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant explaining “I rarely look at a child that I don’t painfully remember the brutal way that mine died”).

182. Aff. of D.M., Br. for Sandra Cano and 180 Women app. B at 47–48, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant describing “problems bonding with my first baby and feeling natural maternal feelings”).

183. Aff. of H.T., Br. for Sandra Cano and 180 Women app. B at 30, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant describing that she “[e]xperienced major clinical depression during and after birth of oldest living child after I learned how abortions were performed and more about fetal development”); Aff. of Marie Skurka, Br. for Sandra Cano and 180 Women app. B at 70–71, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant describing how, eleven years after her abortion, she “was drinking heavily and taking prescription [medication] in excess”); Aff. of Amy Susan Shatrick, Br. for Sandra Cano and 180 Women app. B at 71, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant describing that she suf-

Another theme throughout the affidavits is the suffering of the fetus's biological father. It does not figure as prominently as the theme of maternal suffering, but does appear regularly. One woman reported that she married the father of the aborted fetus, but "[w]e had all girls and he is plagued with the guilt of killing his possible only son."¹⁸⁴ Another stated: "it almost destroyed our marriage."¹⁸⁵ Another wrote about her husband: "We are the walking wounded . . . forever My husband became suicidal as I did. We will always blame each other and never be guilt free."¹⁸⁶

Stated simply, these testimonies concern parent-child relations. They are not about decisions concerning a stranger at arm's length to the woman or the man, or someone else's offspring. Rather, they are decisions about one who is perceived to be both vulnerable and in a family relationship with the woman and the man. Are these testimonies representative of the millions of women who have had legal abortions in the decades since its legalization? It is impossible to say with certainty one way or another, and there is no definitive evidence on a national scale. To repeat an important observation made above, the National Institute of Health, the preeminent health research facility in the U.S., has not attached an abortion question to any of its longitudinal studies about women's health, despite the fact that women have abortions more than any other surgery.¹⁸⁷ However, one group that counsels women post-abortion reported over 100,000 women in its post-abortion recovery programs in 2004.¹⁸⁸ Another such group reports conducting 500 retreats for post-abortion women annually

ferred "[u]nbelievable sadness" and "drank heavily"); Aff. of L.M.S., Br. for Sandra Cano and 180 Women app. B at 70, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) (affiant describing "[y]ears (16 at least) of repeated bouts with serious, suicidal depression"); Aff. of O.F., Br. for Sandra Cano and 180 Women app. B at 42, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007); Aff. of T.D., Br. for Sandra Cano and 180 Women app. B at 44, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) ("My twelve year old daughter has just read this form and I am wanting to die. Right now.").

184. Aff. of Paulette C. Heller, Br. for Sandra Cano and 180 Women app. B at 36, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

185. Aff. of Kathleen Vaunae Hansel, Br. for Sandra Cano and 180 Women app. B at 38, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007) ("Resulted in depression, insomnia, nightmares, inability to make decisions regarding our two living children. It almost destroyed our marriage.").

186. Aff. of O.F., Br. for Sandra Cano and 180 Women app. B at 42, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

187. See generally National Institute for Health, Women's Health, <http://www.health.nih.gov/search.asp/28> (accessed Feb. 22, 2008) (containing no category for "abortion" in a review of all topics available under NIH's subject heading "Women's Health").

188. Br. for Sandra Cano and 180 Women 25, *Gonzales v. Carhart*, 127 S. Ct. 1634 (2007).

in order to discuss the difficult aftermath of their abortions.¹⁸⁹ This evidence seems to affirm the *Gonzales* majority's acknowledgment that "some" women experience loss and sadness after abortion.

In addition to the material relied upon by the *Gonzales* majority, helpful information about possible effects of abortion comes from international studies from countries with less controversial political environments concerning abortion. This research is particularly helpful when it is not based only on women who self-identify as "post-abortion," because reliable evidence suggests that many post-aborted women will deny their abortions¹⁹⁰—itself a possible indicator of distress. Rather, the most informative research includes all women receiving medical care from a centralized national health care system.

In a register linkage study in Finland, for example, researchers reviewed state records of women's lifetime medical histories and found that, in the year following an abortion, post-aborted women had a rate of suicide six times greater than women who gave birth.¹⁹¹ The researchers drew two possible conclusions: either abortion harms mental health, or there are common risk factors for abortion and suicide.¹⁹² A later Welsh study concluded that the former explanation is more likely.¹⁹³ It reviewed women's medical records pre- and post-abortion and found no increased risk of suicide before abortion among the women who had abortions.¹⁹⁴ But it also found the rate of suicide among women after having induced abortions was twice the rate of women giving birth.¹⁹⁵

Quite recently, Finnish researchers performed a follow-up register linkage study and concluded that post-aborted women face a two and one-half times greater risk of suicide, accidental

189. Emily Bazelon, *Is There a Post-Abortion Syndrome?* N.Y. Times 641 (Jan. 21, 2007).

190. See e.g. Elise F. Jones & Jacqueline Darroch Forrest, *Underreporting of Abortion in Surveys of U.S. Women: 1976 to 1988*, 29 *Demography* 113–26 (1992); Frank L. Mott et al., *Fertility Related Data in the 1982 National Longitudinal Surveys of Work and Experience of Youth* (Columbus: Ctr. for Hum. Res. Research at Ohio St. U. 1983) (suggesting that based on national abortion rates, approximately 60% of women having abortions conceal their abortions from researchers with the National Longitudinal Study of Youth).

191. Mika Gissler, et al., *Suicides after Pregnancy in Finland, 1987–94: Register Linkage Study*, *British Med. J.* 1431–34 (1996).

192. *Id.*

193. Christopher Morgan et al., *Suicides after Pregnancy: Mental Health May Deteriorate as a Direct Effect of Induced Abortion*, 314 *British Med. J.* 903 (1997).

194. *Id.*

195. *Id.*

death, or homicide in the following year than do women who gave birth.¹⁹⁶ Most recently, several New Zealand researchers, led by a self-described “pro-choice atheist,”¹⁹⁷ published a widely-noted study in the *Journal of Child Psychology and Psychiatry* finding that it is “difficult to disregard the real possibility that abortion amongst young women is associated with increased risks of mental health problems.”¹⁹⁸ This study’s robust criticism of the American Psychological Association’s continued position claiming a “low” risk of psychological harm¹⁹⁹ has led the APA to convene a task force on “Mental Health and Abortion” to consider new evidence on post-abortion effects for a report due in 2008.²⁰⁰

In sum, there is credible research showing that women suffer after abortion. While the research is not focused solely upon abortion’s effects on the family, it is reasonable to believe that some of the general effects cited, such as depression or suicidal ideation, translate to family relationship difficulties.

Of course, other studies have concluded that many, or even most, women do not suffer mental or family problems after abortion. Some of these studies are accused of exhibiting serious research methodology flaws,²⁰¹ although so are some of the studies claiming post-abortion distress.²⁰² In this situation, a reasonable course of action for any side of the abortion debate claiming interest in the cause of women would be to first pursue a study at the highest possible level, specifically avoiding prior noted methodology flaws. Such avoidance likely means directing the NIH to add abortion questions to one or more of their long-term studies about women’s health. In particular, the study must ensure that it does

196. Mika Gissler et al., *Injury, Death, Suicides and Homicides Associated with Pregnancy, Finland 1987–2000*, 15 *European J. Pub. Health* 459–63 (2005).

197. Warren Throckmorton, *Abortion and Mental Health*, Wash. Times A13 (Jan. 21, 2006) (quoting Mr. Throckmorton as saying, “I’m immune from that charge [of having a pro-life agenda] because I’m pro-choice”); see also Elliott Institute, “Evidence Doesn’t Matter” in *APA Abortion Advocacy*, LifeSiteNews.com, <http://www.lifesite.net/ldn/2006/fed/060216A.html> (Feb. 15, 2006).

198. David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 *J. of Child Psychol. & Psych.* 16, 23 (2006).

199. *Id.* at 23.

200. See Warren Throckmorton, *Abortion and Psychology*, Wash. Times A17 (May 18, 2007).

201. See e.g. David C. Reardon, *A Study of Deception: Feminist Researcher “Proves” Abortion Increases Self Esteem*, 3(4) *The Post-Abortion Review*, <http://www.afterabortion.info/PAR/V3/n4/RUSSO.htm> (1995).

202. See e.g. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1648 n. 7 (2007) (Ginsburg, J., dissenting) (suggesting that the two studies she cites to support claims of post-abortion distress are flawed).

not suffer from women's underreporting of their abortions, from self-selected cohorts, or from an inability to distinguish women with pre-abortion mental health histories from those without.

Second, existing studies employing credible methods deserve consideration. This category includes the European registry studies that by nature do not underreport the class of women having abortions and that have the capacity to determine if a woman seeking an abortion had a pre-abortion history of mental health difficulties.

Third, other relevant literature and common sense must play a role. The literature on miscarriage indicates, for example, that emotional suffering regularly follows miscarriages and, in turn, affects women's future family relationships.²⁰³ It is unreasonable to conclude that women deliberately aborting or being pressured to abort their offspring would automatically escape similar suffering entirely. Based on current research regarding pregnancy loss generally, and post-abortion reactions particularly, it appears more reasonable to surmise that abortion can have real and deleterious effects upon family relationships.

But what about Justice Ginsburg's *Gonzales* dissent, which asserted emphatically that abortion does not lead to worse effects for women than childbirth?²⁰⁴ Justice Ginsburg spoke as if her sources definitively put the argument to rest.²⁰⁵ Yet upon closer inspection, her sources cannot bear that weight for four reasons. Before examining these individually, however, it should be noted that Justice Ginsburg began by erroneously claiming that the majority opinion asserted that *all* post-aborted women suffer regret.²⁰⁶ In fact, the majority spoke only of "some" women.²⁰⁷

203. See e.g. Susan O'Doherty et al., *About What Was Lost: 20 Writers on Miscarriage, Healing and Hope* (Jessica Berger Gross ed., Plume 2007); Kristen M. Swanson et al., *Contexts and Evolution of Women's Responses to Miscarriage during the First Year after Loss*, 30 *Research in Nursing & Health* 2 (2007); Elizabeth H. Lamb, *The Impact of Previous Perinatal Loss on Subsequent Pregnancy and Parenting*, 11 *J. Perinatal Educ.* 33 (2002); Eirini Tsartsra & Martin P. Johnson, *The Impact of Miscarriage on Women's Pregnancy-Specific Anxiety and Feelings of Prenatal Maternal-Fetal Attachment during the Course of a Subsequent Pregnancy: An Exploratory Follow-up Study*, 27 *J. of Psychosomatic Obstetrics & Gynecology* 173 (2006); Annette Kerstin et al., Ltr. to the Ed., *Psychological Stress Response after Miscarriage and Induced Abortion*, 66 *Psychosomatic Med.* 795 (2004).

204. See *Gonzales*, 127 S. Ct. at 1648 (Ginsburg, J., dissenting).

205. *Id.*

206. *Id.* ("The Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices and consequently suffer from '[s]evere depression and loss of esteem.'").

207. *Id.* at 1634.

The first flaw in Justice Ginsburg's dissent is that she called abortion a "painfully difficult decision,"²⁰⁸ but asked the reader to assume that such decisions have no painful or difficult consequences, even for "some" women.²⁰⁹ Second, her most important source (whose verbatim conclusion about abortion's effects she adopted as her own) was the leading pro-choice research organization in the U.S., the Alan Guttmacher Institute.²¹⁰ She next cited a *New York Times* story that failed to report any of the recent or leading European or New Zealand studies previously discussed.²¹¹ Justice Ginsburg's remaining citations relied heavily upon the APA and former leaders and representatives of the APA, Dr. Nadia Stotland and Dr. Nancy Russo.²¹² Yet in a very recent interview regarding the above-described New Zealand findings, Dr. Russo acknowledged that "mental health effects [of abortion] are not relevant to the legal context of arguments to restrict access to abortion."²¹³ The APA currently views abortion as a "civil right[s]" issue.²¹⁴ In other words, Justice Ginsburg's heavy reliance on the APA for *medical* conclusions about abortion's effects was misplaced.

Third, Justice Ginsburg made no reference whatsoever to the more recent and most widely respected European and New Zealand studies finding increased risks for some women post-abortion.²¹⁵

Fourth, Justice Ginsburg did not mention, let alone credit, the testimony of the post-aborted women who addressed the *Gonzales*

208. *Id.* at 1648 n. 7.

209. *Id.* at 1634.

210. Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 Guttmacher Policy Rev. 8 (2006); see Guttmacher Institute, *The History of the Guttmacher Institute*, <http://www.guttmacher.org/about/history.html> (accessed May 30, 2008). The Alan Guttmacher Institute describes itself as originally a "semiautonomous division" of the nation's largest abortion provider, the Planned Parenthood Federation of America. *Id.* Although today it claims to be an "independent" corporation, it publishes material favoring Planned Parenthood's policies in favor of legal abortion. *Id.*

211. See generally Bazelon, *supra* n. 189.

212. *Gonzales*, 127 S. Ct. at 1648 n. 7 (citing and quoting Am. Psychol. Assn., *APA Briefing Paper on the Impact of Abortion*, <http://www.apa.org/ppo/issues/womenabortfacts.html> (accessed May 30, 2008); Sarah Schmiede & Nancy Felipe Russo, *Depression and Unwanted First Pregnancy: Longitudinal Cohort Study*, 331 British Med. J. 1303 (2005); Nadia L. Stotland, *The Myth of Abortion Trauma Syndrome*, 268 JAMA 2078, 2079 (1992); Am. Psychol. Assn., Council Policy Manual: N. Public Interest, pt. 1, § I(3) (1989) (available at <http://www.apa.org/about/division/cpmplibint.html>) (accessed May 30, 2008).

213. Throckmorton, *supra* n. 197, at A13 (quoting Nancy Felipe Russo, referred by the APA to answer the reporter's questions about the New Zealand study).

214. *Id.*

215. *Gonzales*, 127 S. Ct. at 1640–53 (Ginsburg, J., dissenting).

Court via an *amicus* brief.²¹⁶ It was an odd and even hypocritical gesture in a dissenting opinion that otherwise vocally supported the intelligence and autonomy of women to ignore the women's testimony in favor of male abortion doctors' claims regarding the medical necessity of intact D & E abortions.

Together, the medical research and the public claims of post-aborted women show that a significant number of women experience distress, often related to future family relations, as a result of abortion. It is not clear that the sources cited by Justice Ginsburg could easily trump such evidence. In fact, even Justices Ginsburg's and O'Connor's abortion opinions have regularly suggested that there is something inherently difficult and troubling for a woman, and possibly her whole family, about a decision in favor of abortion. These difficulties could arise, it seems, only if the woman or her family perceive abortion as a severance of a type of parent-child relation or the harming of a relatively vulnerable creature.

In making abortion law, ordinary family law presumptions about women's relations with their offspring must be consulted. More research in this area could clarify what is now known about the effects of abortion on women and families. But at this point, one cannot dismiss the possibility that a woman's decision to have an abortion may affect family relationships in the future, including the well-being of future children.

VI. CONCLUSION

The *Gonzales* Court has moved in the direction of bringing abortion law and the rest of family law into greater harmony, and it might be wise for future abortion laws and policies to do the same. Not only does abortion law have its origins in family law, but there exists a real possibility that abortion decisions are experienced by women, and perhaps other family members, as parent-child relationship decisions about vulnerable children.

Where might such a move lead? Would it create a new paternalism on the part of the State and lead to sex-stereotyping of women, as Justice Ginsburg and some commentators fear? The answer is no. Rather, if abortion law were to adopt typical family law presumptions, several benefits could follow: first, better investigation into the family-related health outcomes of abortion and therefore better-informed consent for women; second, increased

216. *Id.*

restriction on later-term abortions; third, improved prevention of unwanted pregnancies; and fourth, greater willingness to harmonize parenting, employment, and other social roles for women.

Preliminarily, it should be noted that none of the suggested outcomes can come to pass without the support of a democratic majority willing to enact them, given that abortion laws come from legislatures. It should not be feared that a minority could “impose” such laws on an unwilling majority. It should also be noted that none of these outcomes necessitate “re-sex-stereotyping” of women. In fact, as will be further discussed below, it is possibly the *failure* to acknowledge self-evident facts about parents’ bonds with their children, and children’s needs, that has prevented greater legal and other progress for women.

A final preliminary observation concerns the difference between employing observations about parents and their pre-natal offspring in making laws limiting abortion, versus employing them solely in the service of providing more information to women considering abortion. Pro-choice advocates strenuously insist that the latter is the only position authentically assisting women. But if women experience abortion as a kind of parent-child decision—and there is substantial evidence that they do—then the law’s typical stance toward these types of decisions is not a wholly inapplicable or inappropriate model. Family law presumes that parents ordinarily wish to preserve a relationship with their biological children and that children sometimes require special protection. That this model may result in some limiting of a very broadly defined abortion right is not by itself a conversation-stopper. No member of the parent-child dyad has unlimited legal rights in any other family context outside abortion. *Gonzales*, by introducing this trait of family law into abortion law, is simply bringing abortion law back to its roots, while harmonizing it with a more realistic assessment of women’s and others’ actual experiences of abortion.

Turning to possible outcomes of allowing abortion law to consider parents’ bonds with their children and children’s relative weakness, a first outcome might include the pursuit of high-level research about the effects of abortion on women, on family well-being, and on children. The notable dearth of such important research has been mentioned several times. This research might include, for example, studies about the nature of the ties, if any, women feel toward the fetal life they carry, whether their pregnancy is “wanted” or “unwanted,” “expected” or “unexpected.” It might

also identify and measure the effects of abortion upon women's later family choices and relationships. It could study abortion's effects, if any, on later-born children and on men. The fetal experience of various types of abortions might also be explored. The results of this sort of research would provide better counseling and informed consent for women seeking abortions.

A second possible outcome of taking parent-child bonds and children's vulnerability more seriously in the abortion context might be the restriction of particularly gruesome or painful types of abortions. Such laws would aim either to protect fetal life from pain or to avoid disrupting more developed parent-child type bonds, or both. They might take several forms: fetal anesthesia requirements; bans on certain abortion methods; or bans on later-term abortions.

A third possible outcome might involve better efforts to avoid unwanted pregnancies. The complete debate over how best to accomplish this is beyond the scope of this article. However, it is noteworthy that simply dispensing more contraception from public and private sources over the past nearly four decades has not answered the problem of high rates of out-of-wedlock births or abortions in the U.S. Nor has a stepped-up focus on abstinence programs in recent years. The full answer must be more complex; it must look beyond the moment that a woman or a couple decide to have sexual relations. It must also address the many reasons why so many men and women fail to respect or acknowledge the procreative aspect of sexual relationships, women's unique gifts and burdens in connection with pregnancy, childbirth and child rearing, and children's needs for sufficient resources and a secure and stable upbringing.

Thinking more broadly, a fourth possible outcome involves further action to harmonize childbearing with a wide variety of social freedoms for women. Of course, this would involve the goal just described above: preventing pregnancies in situations giving rise to tremendous conflicts between caring properly for children and women achieving sufficient education or income. Single-parent pregnancies, for example, may often lead to such challenging situations. It would also involve, however, a mixture of state law and both public and private policies improving the availability and flexibility of employment and education for women to a degree not yet accomplished.

This last possible outcome specifically addresses the fears of pro-choice leaders and scholars that acknowledging parent-child

bonds and children's needs can only result in the sex-stereotyping of women. Certainly, the *Gonzales* Court's acknowledgment of only a *mother-child* bond²¹⁷ helps give rise to this concern. That is, the Court spoke as if fathers have no similar feelings for their offspring and, more ominously, as if they bear no responsibility respecting either abortion or childbirth. While the Court likely addressed only the mother's bond because she is legally alone in the abortion context—the father having no legally recognized veto power—the Court should have at least acknowledged that both biological parents have feelings and responsibilities toward their offspring.

Either way, denying the self-evident connection mothers feel to their children will not further women's progress. Rather, achieving progress and freedom for both women and men requires helping them to meet both their personal obligations as well as their obligations to their employers and wider society. Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, only results in policies reinforcing an outdated and largely male model of social life and employment²¹⁸—a model in which no institution need “flex” or change to allow women and men to meet children's needs. On the other hand, recognizing that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet is both more realistic and a more likely premise for a successful argument in favor of family-friendly work and education policies. This is true even if, as past decades have shown, women are more likely than men to take advantage of these policies by, for example, working flexible or part-time hours.

Denying that women feel a deep bond with their children, or that women perceive and respond to children's natural vulnerability, does not reflect the reality of women's lives. Nor does it seem the most persuasive path toward demanding, and achieving, effective accommodation for the educational and employment aspirations women hold. In fact, it seems to constitute a claim that women's childbearing abilities and maternal responses are inherent disabilities. This argument is not only flawed but sexist in the

217. *Id.* at 1634.

218. See generally Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford U. Press 2000) (arguing that modern employment laws and policies are largely based upon the model of an ideal male worker, unencumbered by childcare interests or responsibilities).

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most fundamental sense. It is no premise for a true or effective feminism. However, if future abortion jurisprudence follows the path down which *Gonzales* started, laws and policies concerning unborn children could begin to reflect the deep bond that women and men feel toward both their unborn and born children, paving the way for social and economic institutions to follow suit.

